United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7071

United States Court of Appeals

For the Second Circuit

AMERICAN METAL CLIMAX, INC.,

Plaintiff-Appellee,

against

ESSEX INTERNATIONAL, INC.,

Defendant-Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

Statutes and Rules:

PAGE

Other Authorities:

TABLE OF ABBREVIATIONS

———a—Refers to the indicated page of the Joint Appendix.

———E—Refers to the indicated page of the volume of exhibits which is part of the Joint Appendix.

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Docket No. 75-7071

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Preliminary Statement

This is an appeal from an order and judgment entered December 20, 1974, and the supporting Findings of Fact and Conclusions of Law dated November 22, 1974, by the Honorable Constance Baker Motley, United States District Judge, Southern District of New York, which are unreported.

Issues Presented for Review

1. Under New York law, can a party recover estimated future profits as damages for breach of a contract encompassing a new venture if he ignores substantial elements of his cost in forecasting future profits?

2. In calculating "lost profits" as damages for breach of contract, can the injured party rely solely upon forecasts of future costs made at the time of breach and ignore

post-breach changes in actual costs which would have substantially affected his profit margins when the actual post-breach costs and selling prices were available to him at trial?

3. In giving "due credit for payments or proceeds of resale" when calculating lost profits under U.C.C. §2-708 (2), can the seller rely on estimates of those proceeds made at the time of breach when the actual resale figures are available from his own books and records?

4. If a contract encompassing the installation and operation of prototype machinery expressly provides that one party may enter the plant and remove the equipment "in the event of any breach by the [second party] of any of its agreements herein," and the second party fails to assume responsibility for maintenance of the equipment as it was obliged to do under the contract, is the first party then justified in terminating the contract by removing the equipment?

Statement of the Case

A. Nature of Case and Disposition Below

This is a contract action involving two agreements between Essex International, Inc. (hereinafter "Essex") and American Metal Climax, Inc. (hereinafter "Amax") which related to the installation and operation of equipment used to convert molten aluminum into aluminum rod. The contracts were signed in December, 1966, and the equipment was installed by Essex during November, 1967. Thereafter, operations were plagued with a series of equipment failures and operational problems, and in May, 1968, Essex terminated the two contracts.

In May, 1969, Amax sued Essex for breach of contract, and Essex counterclaimed alleging breach of contract by Amax. The case was tried before the Honorable Constance Baker Motley in January, 1974, and on November 22, 1974, Judge Motley held that Essex had breached its obligations under the two contracts, Amax had not, and awarded dam-

ages to Amax in the amount of approximately $4.1 million for lost profits and $425,000 pursuant to an alleged settlement agreement of the parties, plus interest from mid-1968.

B. The Facts

1. Contract Negotiations

In early 1966, Essex, a manufacturer of wire and cable headquartered in Ft. Wayne, Indiana, ordered a Model 8 Properzi continuous caster for installation at its new plant in Paducah, Kentucky. A Model 8 Properzi converts molten aluminum into three-eighths inch aluminum rod in a continuous series of operations (18a; 417a-418a; 471a-472a).

The Model 8 Properzi ordered by Essex was to be the prototype of its size although smaller models (Model 7, Model 6, Model 5, etc.) manufactured by the same Italian company were in operation in the United States, and indeed Essex had a Model 5 Properzi and had operated it for several years. The selling feature of the Model 8 Properzi was its high operating rate of 14,000 pounds per hour as contrasted to an operating rate somewhere between 8,000 to 9,000 pounds per hour for a Model 7 Properzi (18a; 417a; 457a; 493a).

Also in early 1966 Essex approached Amax in an effort to find a partner for an aluminum reduction plant, and during the course of those discussions it was suggested that Essex's Model 8 Properzi then on order might be installed at a new reduction plant near Bellingham, Washington, operated by Intalco Aluminum Corporation (hereinafter "Intalco"), a joint venture by three partners, one being Amax (19a; 162a; 405a-407a).

In August, 1966, Essex and Amax reached tentative agreement concerning installation of the Model 8 Properzi at Intalco (205E-209E). Thereafter this tentative agreement was formalized in two written contracts, the Lease Agreement and the Supply Contract, both dated December 14, 1966, which form the basis for this action (157E-168E).

2. *Obligations Imposed by Lease Agreement*

Under the Lease Agreement, Essex leased its Properzi to Amax for a nominal fee. Amax had the right to use the machine to produce rod for its own account or for sale to others, but Essex was entitled to a royalty on all such production at the rate of one-quarter cent per pound for rod produced for Amax's own use and three-eighths cent per pound for rod sold by Amax to others (158E-159E).

Essex had four basic obligations under the Lease Agreement. First, Essex was obligated to install the Properzi at a location in the Intalco plant determined in consultation with Amax. Second, after installation, Essex was obligated to provide adequate training in the operation of the Properzi for the original crew. Third, Essex was responsible for the original "running-in" of the Properzi. Fourth, Essex was obligated to give Amax all the technical assistance needed to run the Properzi throughout the life of the Lease Agreement (159E).

Amax had three basic obligations under the Lease Agreement. First, Amax was to supply the original crew who would be trained by Essex. Second, Amax's crew was to operate the Properzi. Third, from the completion of the installation of the Properzi and its running-in subsequent to that date, Amax had responsibility for day-to-day maintenance and for making repairs (159E).

Although Amax's crew had responsibility under the Lease Agreement for operating the Properzi, there was an initial dispute between the parties as to when this operating responsibility commenced. However, the matter was resolved in January, 1968, when the parties agreed by letter exchange that the Properzi "will be considered operating normal beyond the original run-in period and become the operating responsibility of Amax when . . ." certain specified conditions were met (12E-17E).

3. *Obligations Under the Supply Contract*

Pursuant to the Supply Contract, Essex agreed to purchase at least 18,000,000 pounds of aluminum rod out of the Properzi's output during each of the years 1968 to 1973, and had the option of purchasing up to 25,000,000 pounds in

each of those years. However, Amax had no obligation to make deliveries to Essex under this Supply Contract until the Properzi was "operating normally." Likewise, neither party had obligations under the Supply Contract if "failure of the Properzi rod processing and related equipment . . . to function properly . . . interfered with production" (163E-168E).

4. Installation and Start-Up

Although the Lease Agreement anticipated installation of the Properzi on or before March 31, 1967, delivery from Italy was delayed through fault of neither Essex nor Amax but because the manufacturer was experiencing design problems with the key features of the equipment—the secondary cooling system and the casting molds (22a; 424a-425a; 159E; 236E; 238E). The equipment was finally shipped from Italy in early August, 1967, it arrived on location at Intalco late that month, and installation commenced and continued through October. By November 1, 1967, last minute changes had been completed and the equipment was ready to be operated (424a; 427a). Amax concedes that the Model 8 Properzi was "installed" within the meaning of the Lease Agreement (256a).

Charles Kilburn, an Essex engineer having considerable experience in the installation and start-up of manufacturing equipment, including experience with a Model 5 Properzi, supervised the installation of the Model 8 Properzi at Intalco and was likewise in charge of the start-up operations and the training for Amax's crew (412a-418a). The first casting was made on November 3, 1967, rod was actually produced on the equipment on November 14, 1967, and by December 11, 1967 one railway car of finished rod (70,928 pounds) had actually been shipped to Essex (442a-443a; 57E; 69E).

During this start-up period, four representatives of the Italian manufacturer were present at the plant. Two of the Italians specialized in the electrical system encompassed in the Model 8 Properzi and went over the whole electrical system with the maintenance people at Intalco to show the latter how the equipment functioned and what adjustments

were available. The other two Italians specialized in the mechanical aspects of the Model 8 Properzi, and they instructed the Intalco people as to the functioning of these parts of the equipment (441a-443a; 57E; 59E).

Representatives of Nichols Wire & Aluminum Company (hereinafter "Nichols"), United States agent for the manufacturer, were also present during start-up and helped with the early casting efforts once the equipment had been completely checked out. Thus, throughout November the Intalco crew was trained under the supervision of Mr. Kilburn, assisted by the four Italians and the Nichols representatives (441a-443a; 57E; 59E).

5. Operational Problems

The Model 8 Properzi was operated from November, 1967 until it was shut down on May 17, 1968 (59E). During that period, rod production was repeatedly interrupted because of various equipment failures.

For example, the spouts used for pouring the molten aluminum onto the casting mold repeatedly broke, cracked, or otherwise failed after minutes or an hour or two at best. When the Properzi was shut down in May, this pouring spout problem remained to be solved (76a; 446a-450a; 296a-297a; 72E; 78E; 100E; 103E; 186E).

Similarly, operations were repeatedly disrupted by failures of the molds on the casting wheel. The molds originally shipped by the manufacturer were experimental because the mold design had not yet been finalized. Although adjustments were made and re-designed molds tried, the mold problem had likewise not been solved when the Properzi was shut down in May (77a; 450a-454a; 236E-245E; 97E; 186E-187E).

Directly related to the mold problem was a third equipment problem: failure of the secondary cooling system. It was the secondary cooling feature of the Model 8 Properzi which purportedly enabled the equipment to operate at such a high production rate as contrasted with earlier models, but the system did not function as expected and by May it was clear that the problem of cooling controls had to be remedied before high production rates could be

achieved (78a-79a; 454a-466a; 186E; 321a-322a). In fact, no operator of a Model 8 Properzi in the United States has ever been able to make the secondary cooling system function (492a-493a; 534a-535a).

Finally, production was disrupted during the course of operations at Intalco by problems with the emulsion. The emulsion is a liquid consisting of tiny particles of water surrounded by an oil film which cools the casting as it is reduced in size in the 17-stage rolling mill and also acts as a lubricant between the rolls and the metal. During early 1968, problems were repeatedly experienced with the emulsion which resulted in rod breakage in the rolling mill. When the equipment was shut down in May, the art of emulsion control remained a development area (79a-80a; 466a-470a; 99E; 187E).

In addition to equipment failures, Kilburn complained to Amax and Intalco that his efforts to get the Properzi to operate at a high production rate were being frustrated by a lack of, or inadequate, maintenance (445a). Intalco reviewed Kilburn's complaints in January, and again in March, but did not even assign a mechanical maintenance man to the Properzi equipment until early May following a meeting between Intalco and representatives of Nichols (259a; 230E; 223E; 309a; 315a-317a).

Amax was well aware that successful operation of the Properzi required attention to detail and at least some experienced staff. In July, 1967, well before operations at Intalco commenced, the President of Amax had asked Paul Hoboy, head of Amax's Aluminum Technical Services group, to make recommendations with respect to the future operation of the Properzi at Intalco. Hoboy responded that the technical aspects and requirements of the equipment would "require a great deal of attention" and that Amax "would be well advised to find metallurgical talent with experience on this particular equipment" (218E).

Despite this recommendation, Amax made no effort whatsoever in selecting people to work on and maintain the Properzi to hire someone who had prior experience on Properzi equipment. In fact, the cast house superintendent at Intalco who was in charge of staffing the Properzi project

and in charge of maintenance was never advised of Hoboy's recommendation and did not even look into the question of whether there were any people available who had experience on earlier Properzi models (311a-314a)—notwithstanding the fact that one of the other partners in Intalco, Pechiney, had "many years" experience with Properzis (273a).

As a result, Kilburn experienced a variety of problems in trying to operate the Properzi because of a lack of support from Intalco (83a-84a; 473a-476a). Representatives of Nichols agreed that Intalco was not giving the Properzi the attention required, and recommended in mid-April that the Intalco supervisor be replaced which thereafter was done (564a).

In an effort to get the Model 8 Properzi installed, run-in, and operating normally, Kilburn spent 111 work-days at Intalco between August, 1967 and May, 1968. Representatives of Nichols spent 33 work-days at Intalco. Four Italian representatives of the manufacturer spent an additional 64 work-days at Intalco (57E; 59E). Scores of equipment or design defects were remedied by Kilburn through corrective action (85a-86a). Nichols was repeatedly consulted and every suggestion made by Nichols was followed (534a; 59E). Assistance was also obtained from the emulsion supplier and from the spout manufacturer (469a; 99E; 89E).

Notwithstanding all such efforts, by May 1, 1968, after more than five months of operations, the Model 8 Properzi had not even approached its guaranteed production rate. During the course of operations over this period, the Model 8 Properzi had averaged only 1,831 pounds of rod per production hour, and on April 1, 1968 when the Properzi was operating at its best it averaged only 11,000 pounds per hour over a seven-hour period (2E; 38E).

Essex and Amax agree that the Properzi was never "operating normally" as that term had been defined by the parties (255a-256a). Their dispute centers upon why this was the case. Essex contends that the Properzi never reached the point of "operating normally" because of design deficiencies, equipment failures, and inadequate maintenance and support by Amax.

6. *Termination of Contracts*

In early May, 1968, the top management at Essex held meetings in Ft. Wayne and Marion, Indiana, to review the overall situation. After consulting with Mr. Kilburn, analyzing the history of operations at Intalco and the equipment and maintenance problems experienced, Essex concluded that it was entitled to terminate the two contracts with Amax and remove the Properzi (345a-346a; 398a-401a; 409a).

On May 10, 1968, Essex notified Amax by letter that the Properzi had failed to live up to its specifications and Essex intended promptly to remove the Properzi and related machinery and restore the site as it was entitled to do. The letter also noted that such removal would terminate the Supply Contract because the latter was premised upon the operation of the Properzi at Intalco (38E-39E). On May 17, 1968, Amax in essence denied the contentions of Essex, but thereafter offered to meet with Essex to discuss the situation (41E-48E).

On June 10, 1968, representatives of Essex and Amax got together to review their differences with respect to the Properzi at Intalco, and in particular to discuss the possibility of Essex selling the Model 8 Properzi to Amax. Essex offered to sell the equipment to Amax in place and installed for $1.4 million, and Amax offered to purchase it for $850,000. No agreement was reached at this time, and although further discussions occurred this proved to be the final position of the parties (166a-168a; 191a-192a; 348a-349a; 193E-194E).

On June 24, 1968, Kilburn went to the plant at Intalco, and Intalco, after checking with Amax, allowed him to enter its plant with a crew to remove the equipment. This removal was accomplished over the next few weeks (326a-327a; 479a-480a).

Essex stored the equipment for several months, built a new plant in Boonville, Indiana, and then reassembled the equipment in Boonville (481a). After re-designing the Model 8 Properzi with the assistance of Nichols and with the benefit of certain ideas originating with other operators of Model 8 equipment, Essex commenced operations at

Boonville in March, 1969 with Kilburn in charge of not only installation and running-in but also maintenance and operations (90a-93a). With this type of control and support, Kilburn was ultimately able to get his modified version of the Model 8 Properzi to operate at a satisfactory production rate (462a-463a).

POINT I

The damage award for "lost profits" in the amount of $4.1 million is not supported by credible evidence.

A. Amax's Damage Theory

Amax's only claim for damages, which was adopted *carte blanche* by Judge Motley, was for "lost profits" in the amount of $4.1 million. Amax purportedly would have earned such profits from rod sales to Essex under the Supply Contract (162E) and from rod sales to Okonite under a separate agreement (224E).

Essex does not argue with Judge Motley's findings that future profits were contemplated by the parties or that lost profits are theoretically recoverable either under Section 2-708 of New York's Uniform Commercial Code or otherwise. However, this hypothetical right to recover lost profits does not do away with plaintiff's burden of proving them. Here Amax offered a blackboard calculation (156E) supported by *one* document, a 1968 Intalco *estimate* (179E), and general testimony.

The amount of "lost profits" was forecast by Amax as follows. First, the alleged profit per pound under both the Supply Contract with Essex and the Okonite Contract was estimated by taking Amax's selling price as specified in the two contracts and subtracting Intalco's production costs as estimated in May, 1968. This purported per-pound profit was then multiplied by the total poundage over the respective lives of the two contracts in question to get total lost profits. Amax then deducted the profit it in fact made by selling the metal in question as T-ingot to other purchasers instead of as rod to Essex and Okonite (156E).

In doing so, Amax utterly failed to meet its burden of proof as to damages under the applicable standards. First, the record is absolutely void as to Amax's production costs. In calculating its lost "profits," Amax simply adopted Intalco's estimated costs, and ignored significant elements of its own cost. Only Amax's costs are relevant in determining Amax's profits. Second, no one's costs were proved with competent business records. Third, the Intalco costs which were utilized in the calculation were *estimates* prepared in May 1968 before the prototype Properzi had ever operated normally. Those Intalco estimates were then applied over the entire 5-year damage period notwithstanding the fact that the major cost elements increased markedly and even though the *actual* cost numbers for the major cost elements were available at trial had Amax not apparently preferred the May 1968 "guesstimates." Fourth, Amax likewise used estimates as of May 1968 for its offsetting profit on T-ingot when its actual profit on T-ingot over the years in question was available at trial from its own business records.

In short, Amax failed to provide a legally sufficient base for the award of "lost profits" granted by the Court below.

B. Plaintiff's Burden in Proving Damages

Jurisdiction is based upon diversity of citizenship; accordingly New York law is applicable to the controversy between the parties.

1. In General

Amax's lost profits are attributable to two contracts covering rod sales—the Supply Contract with Essex and a separate contract with Okonite. Damages for alleged breach or repudiation of the Supply Contract by Essex are governed by New York's Uniform Commercial Code and specifically Section 2-708(2) insofar as lost profits are concerned. On the other hand, lost profits attributed to the Okonite Contract are based upon Essex's alleged breach of the Lease Agreement which does not fall within the Uniform Commercial Code. However, the applicable prin-

ciples, whether under New York common law or under the Uniform Commercial Code, are essentially the same.

The rule under New York common law was recently reiterated by the Court of Appeals in *Freund* v. *Washington Sq. Press, Inc.*, 34 N.Y.2d 379, 382, 314 N.E.2d 419, 420-21, 357 N.Y.S.2d 857, 859-60 (1974),

> "It is axiomatic that . . . the law awards damages for breach of contract to compensate for injury caused by the breach—injury which was foreseeable, i.e., reasonably within the contemplation of the parties, at the time the contract was entered into . . . Money damages are substitutional relief designed in theory 'to put the injured party in as good a position as he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract.' . . . In other words, so far as possible the law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury—whether it be losses suffered or gains prevented—was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven. . . . But it is equally fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed." (Citations omitted).

See generally 5 *Corbin on Contracts* §§990-1101 (1965); Fuchsberg, *N.Y. Damages Law* §21 (1965); 11 *Williston on Contracts* §§1338-1417 (3d ed. 1968).

Similarly, under New York's Uniform Commercial Code, when a seller sues for lost profits caused by a buyer's repudiation of a contract, again the test is "to put the seller in as good a position as performance would have done . . ." U.C.C. §2-708(2). Moreover, Section 1-106 provides general guidance as to the intention of the drafters of the Code:

> "(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved

> party may be put in as good a position as if the other party had fully performed but neither consequential nor special nor penal damages may be had except as specifically provided in this Act or by other rule of law."

As to burden of proof, *Dunkel* v. *McDonald*, 272 App. Div. 267, 270, 70 N.Y.S.2d 653, 656 (1st Dept. 1947), *aff'd on limited appeal*, 298 N.Y. 586, 81 N.E.2d 323 (1948), concisely summarizes the New York law:

> "A plaintiff seeking compensatory damages has the burden of proof and should present to the court a proper basis for ascertaining the damages he seeks to recover. They must be susceptible of ascertainment in some manner other than by mere conjecture or guesswork."

Similarly, in *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 209, 4 N.E. 264, 266 (1885), the Court of Appeals emphasized that damages

> "must not be merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed . . . They may be so uncertain, contingent and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved."

See also *Broadway Photoplay Co.* v. *World Film Corp.*, 225 N.Y. 104, 109, 121 N.E. 756, 758 (1919); *Walter Janvier, Inc.* v. *Baker*, 229 App.Div. 679, 680, 243 N.Y.S. 173, 174 (1st Dept. 1930); *Witherbee* v. *Meyer*, 155 N.Y. 446, 50 N.E. 58 (1898).

True, it has long been the rule in New York "that when it is certain that damages have been caused by a breach of contract and the only uncertainty lies in the amount of

such damages, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach." *Mortimer* v. *Bristol*, 190 App.Div. 452, 461, 180 N.Y.S. 55, 61 (1st Dept. 1920); *Dunkel* v. *McDonald*, *supra*. The application of this latter principle, however, is subject to the qualification that damages shall be ascertained by the "best evidence obtainable," *Mortimer* v. *Bristol*, *supra*, 190 App.Div. at 462, 180 N.Y.S. at 62, by "probable estimates," *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, *supra*, and upon "the relevant facts antecedent and subsequent to the breach" with "such reasonable certainty as serves as a basis for the ordinary conduct of human affairs," *Stevens* v. *Amsinck*, 149 App.Div. 220, 229, 230, 133 N.Y.S. 815, 822 (2d Dept. 1912).

The New York case law has provided a number of examples of what will suffice as "the best evidence obtainable" as opposed to mere speculation or wishful thinking. In *Broadway Photoplay Co.* v. *World Film Corporation*, *supra*, Judge Cardozo, writing for a unanimous Court of Appeals, held that damages could not be recovered for a breach of contract to supply plaintiff with first-run motion pictures one day a week if the only proof was estimates and guesswork. Judge Cardozo stated that while "[t]he plaintiff was not required to prove its damages to the dollar . . . [i]t was required . . . to supply some basis of computation . . . and this it did not do."

> "It is true, of course, that the conditions of a business affect the possibilities of proof and thus the measure of recovery. No formula can be framed, regardless of experience, to tell us in advance when approximate certainty may be attained. The rule of damages must give true expression to the realities of life. We do not need to determine what the plaintiff's rights would be if it were able to establish the uniformities which it asserts. The sufficient answer is that it has failed utterly to establish them. . . . There can be no stable foundation for a verdict that is built on [plaintiff's] assumptions. Nothing but guesswork can place the

damages at $4,500 or any other fixed amount." 225 N.Y. at 108, 121 N.E. at 757-758.

See also *Dunkel* v. *McDonald, supra; Walter Janvier, Inc.* v. *Baker, supra; Penrose* v. *Arrow Constr. Co.*, 15 M.2d 512, 517, 182 N.Y.S.2d 642, 647 (Sup. Ct. N.Y. Co. 1958); *Esterowicz* v. *Alotun Corp.*, 109 N.Y.S.2d 480 (Sup. Ct. Kings Co. 1951).

Moreover, if plantiff has credible evidence within its possession or control which would establish its damages with certainty, but chooses not to introduce that evidence and relies instead upon estimates and guesswork, then all reasonable inferences will be construed against him:

> "The overall burden of proving damages was on plaintiff, including the burden of showing a fair and approximate estimate of the cost-to-be-deducted from the gross commission . . . Furthermore, plaintiff was in control of the records and of the witnesses, whose testimony would establish its actual loss, including 'deductible savings in costs' . . . and, therefore, the burden of evidence would rightfully be imposed on it . . . Otherwise put, we may, in any event, construe most strongly against the plaintiff all reasonable inferences which it had within its control." *West, Weir & Bartel, Inc.* v. *Mary Carter Paint Co.*, 31 A.D. 2d 517, 517-18, 294 N.Y.S. 2d 837, 838 (1st Dept. 1968), *modified on other grounds*, 25 N.Y. 2d 535, 255 N.E. 2d 709, 307 N.Y.S. 2d 499 (1969).

See also *Noce* v. *Kaufman*, 2 N.Y. 2d 347, 353, 141 N.E. 2d 529, 531, 161 N.Y.S. 2d 1, 5 (1957).

Broadway Photoplay, Dunkel and similar cases also emphasize that when it is possible that other factors offset, in whole or in part, a plaintiff's lost profits, it is incumbent upon the plaintiff to account for the effect of such factors before he has met his burden of proof. The same rule is codified in U.C.C. §2-708(1) governing a seller's damages for repudiation by the buyer and specifies that the measure of damages "is the difference between the market price at the time and place for tender and the unpaid contract

price . . . less expenses saved in consequence of the buyer's breach." Similarly, under Section 2-708(2) the "profit . . . which the seller would have made from full performance by the buyer" is the seller's gross income less the expenses he would necessarily have incurred in performing his own obligations. Otherwise, the seller is not put in as good a position as if the buyer had performed but in a better position. See also U.C.C. §2-706(1).

The New York cases clearly set forth the types of offsetting savings which the plaintiff must account for. See *American Electronics, Inc.* v. *Neptune Meter Co.*, 33 A.D. 2d 157, 158, 305 N.Y.S. 2d 931, 933 (1st Dept. 1969) ("plaintiffs' cost of performance" which was plaintiffs' "cost of labor, materials and applicable overhead"); *E. W. Bruno Co.* v. *Friedberg*, 28 A.D. 2d 91, 92, 281 N.Y.S. 2d 504, 507 (1st Dept. 1967), *aff'd*, 23 N.Y. 2d 798, 244 N.E. 2d 872, 297 N.Y.S. 2d 302 (1968) ("many factors unrelated and not chargeable to the wrong of defendants, namely, costs, margin of profits . . . expenses . . ., inventory price adjustments and efforts of and changes in personnel . . ."). See also *Mullen* v. *Sinclair Refining Co.*, 32 A.D.2d 1000, 301 N.Y.S. 2d 716 (3d Dept. 1969) ("such factors as the property's age, use, wear and tear, deterioration and depreciation"); *342 Holding Corp.* v. *Carlyle Construction Corp.*, 31 A.D.2d 605, 606, 295 N.Y.S. 2d 248, 250 (1st Dept. 1968) ("relevant overhead").

Finally, if a seller seeks lost profits as damages in the event of a buyer's repudiation, he must mitigate damages by selling to a third party if possible. Whether the seller proceeds at common law, gives "due credit for payments or proceeds of resale" under U.C.C. §2-708(2), or utilizes the specific resale provision of U.C.C. §2-706, it is clear that he must account for the actual proceeds received upon resale. See *Bache & Co.* v. *International Controls Corp.*, 339 F.Supp. 341 (S.D.N.Y. 1972); *American Broadcasting-Paramount Theatres, Inc.* v. *American Mfrs. Mut. Insur. Co.*, 48 M.2d 397, 265 N.Y.S.2d 76 (Sup. Ct. N.Y.Co.), *aff'd*, 24 A.D.2d 851, 265 N.Y.S.2d 577 (1st Dept. 1965), *aff'd*, 17 N.Y.2d 849, 218 N.E.2d 324, 271 N.Y.S.2d 284, *cert. denied*, 385 U.S. 931 (1966).

2. *The Burden of Proof in a "New Venture" Situation*

Where a plaintiff was engaged in a "new venture," his burden of proof is significantly more severe because a court cannot accept comparisons with prior performance in unrelated areas as a basis for recovery. *Cramer* v. *Grand Rapids Show Case Co.*, 223 N.Y. 63, 119 N.E. 227 (1918); *Broadway Photoplay Co.* v. *World Film Corp.*, *supra*. Therefore, absent unusual circumstances, no recovery may be had for lost profits resulting from the interruption of a new venture as opposed to an existing and ongoing business because such profits are regarded as too uncertain and speculative. *For Children, Inc.* v. *Graphics Int'l, Inc.*, 352 F.Supp. 1280 (S.D.N.Y. 1972); *Bernstein* v. *Beech*, 130 N.Y. 354, 29 N.E. 255 (1892); *Deluise* v. *Long Island R.R. Co.*, 65 App.Div. 487, 72 N.Y.S. 988 (2d Dept. 1901), *aff'd*, 174 N.Y. 516, 66 N.E. 1106 (1903); *Witherbee* v. *Meyer*, *supra*. Compare: *Freund* v. *Washington Sq. Press, Inc.*, 41 A.D.2d 371, 343 N.Y.S.2d 401 (1st Dept. 1973), *modified*, 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974).

C. Amax Failed to Sustain Its Burden of Proof

1. *Amax Completely Ignored Significant Elements of Its Cost*

Amax's blackboard calculation of lost profits (156E) is based upon the difference between its selling price to Essex and Okonite under the Supply Contract and Okonite Contract respectively, less the estimated cost of producing the aluminum rod being sold. However, in making that calculation, Amax mixed apples with oranges because, on the one hand, it utilizes Amax's selling prices but, on the other, deducts Intalco's costs rather than Amax's own costs.

The 17.0 cent cost figure used by Amax in its blackboard calculation was estimated on May 29, 1968 by a financial officer of Intalco, Thorley Briggs (179E). Briggs testified that Intalco's "standard cost" in the fall of 1967 for hot metal coming out of the pot lines was 15.2 cents per pound. By adding an unknown amount for the cost of boron (an

alloying ingredient) and some additional amount for handling losses in the cast house, Briggs derived the 15.769 cents per pound figure reflected on Exhibit D-30 as Intalco's "standard cost" for hot metal used in producing aluminum rod on the Properzi (228a-229a).

Briggs then set out to estimate the cost of converting that hot metal into rod *via* the Model 8 Properzi.* In doing this, as reflected on the attachment to Exhibit D-30, he allocated a portion of the total cost for the cast house (where the Properzi was located) to the Properzi, applied Intalco's standard labor rates to six operators needed for the Properzi, added 10% to reflect overtime, applied a 23% factor to reflect Intalco's "standard" fringe benefit rate for the plant at that time, and similarly endeavored to forecast the cost of electric power, operating supplies, maintenance, and the like, to come up with $72.756 as the hourly cost for running the Properzi (229a-235a).

Briggs then determined the cost per pound of making rod by dividing this hourly rate by alternative operating rates which, at a rate of 9800 pounds per hour, results in a per pound cost of $0.00742. To this figure was added Intalco's standard shipping cost, standard dross recovery cost, and standard rent and plant allocation. Thus, Intalco's estimated cost for producing aluminum rod on the Properzi ranged from a high of 17.053 cents per pound at an operating rate of 9800 pounds per hour to a low of 16.831 cents per pound at an operating rate of 14,000 pounds per hour (235a-237a).

Assuming arguendo that 17.0 cents is a realistic forecast of Intalco's cost for producing rod on the Properzi, what is Amax's cost? Amax had a number of employees who spent significant time working on Properzi problems either at Intalco or at Amax's headquarters in New York while the Properzi was actually at Intalco, and their efforts would have been required throughout operations had such continued.

For example, Thomas Kaufmann, a Vice President of Amax, negotiated the contract, worked with Kilburn on

* Briggs' expertise for making that estimate is discussed pp. 26-27 *infra.*

installation problems, met with Essex at Intalco and in New York in connection with operating problems, dealt with Dunstan of Essex concerning rod purchases, negotiated contract interpretations with Essex, and so forth (506a-507a; 511a-516a). Herb Clough of Amax succeeded Kaufmann in early 1968 and thereafter was intimately involved with Essex on hot metal purchases, contract interpretations, and disputes over the sharing of costs (161a). Paul Hoboy, head of Amax's Aluminum Technical Services Group, was consulted from time-to-time concerning technical problems involving the Properzi (214E). Dennis Arrouet, Comptroller of Amax's Primary Metal Division, handled accounting problems that related to the Properzi operation (253E, 516a). Amax's inside lawyers drafted the original contracts and were subsequently involved in interpretation problems (204E-209E; 254E; 506a). Steven Furbacher, President of Amax Aluminum, was involved from time-to-time with the Properzi (155a-156a; 208a-212a). Other employees had to handle the shipping and distribution problems of delivering rod from Intalco to Essex, Okonite, and other customers.

Amax makes no pretense of accounting for the time, travel and other expenses for these or any other employees directly involved in the Properzi operation, to say nothing of the inevitable support personnel at Amax's headquarters who had to handle auditing, payroll and other overhead problems. The record is completely void on Amax's own costs over and above the costs of its supplier, Intalco. Compare *For Children, Inc.* v. *Graphics Int'l, Inc.*, 352 F. Supp. 1280, 1285-86 (S.D.N.Y. 1972).

Second, Intalco was a joint venture of three independent companies, only one of which was Amax (162a). Did Intalco supply operating personnel for the Properzi plus support services out of the goodness of its heart or was Amax charged for these services? There is no reason to believe that Intalco was a non-profit institution whose mission was to serve Amax, and in fact it is clear that this was not the case because Briggs testified that Intalco billed the partners a premium over its cost for the different forms

in which aluminum came out of the cast house (228a; 238a; 114a). Nonetheless, at no time did he, or any of the Amax witnesses, reveal what the premium charged by Intalco was for aluminum in the form of three-eighths inch rod or, for that matter, in any other form. Clough of Amax simply ignored that cost element in his blackboard calculation. Amax's cost, however, would be no less than the Intalco estimated cost of 17.053 cents per pound plus this premium or profit to Intalco.

Amax obviously has records in its possession from which it could have shown the premium it had to pay Intalco over Intalco's costs for hot metal and each other form of aluminum out of the cast house, to say nothing of its own direct employee costs, affiliated disbursements, and support services.* Without these figures, Amax's blackboard calculation is meaningless because it omits crucial elements of Amax's cost—Amax's own costs and the profit Intalco charged Amax on redraw rod.

Based upon Briggs' testimony and the one piece of paper in support thereof, Briggs' estimate of May 29, 1968, Judge Motley made the following finding:

> "(a) The cost of producing a pound of Properzi rod at Intalco in May 1968 was 17.0 cents, 15.8 cents of which was for molten metal." (147a)

Nowhere did she make a finding as to Amax's cost. Thus her finding (c) that "Amax's profit on rod sales to Essex would have been 7.36 cents per pound (price minus cost)" (147a) and her finding (e) that "Amax's profit on rod sales to Okonite would have been 8.02 cents per pound" (147a), both of which are calculated on the basis of Amax's prices to Essex and Okonite less Intalco's 17.0 cent cost, are clearly erroneous.

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* Where a party has evidence in his possession which could support his version of the facts and withholds it, the evidence is presumed to be adverse to him. *Noce* v. *Kaufman, supra; Wigmore On Evidence* §285 (3d ed. 1940); see Federal Rules of Evidence, Rule 302 (effective July 1, 1975); *West Weir & Bartel, Inc.* v. *Mary Carter Paint Co., supra* at p. 15.

2. *Amax Relied on Estimated Costs Where the Actual Costs Were in Its Possession or Control*

Over and above the void in the record as to major elements of Amax's cost, the 17.0 cent cost estimate is really a combination of many individual cost elements, all of which varied markedly over time. Amax has chosen to rely upon rough, one-shot estimates for each of these costs calculated by Intalco prior to the time that the Properzi operated normally even though the actual costs for the significant elements over the whole time period in question are readily available from records in Amax's possession or control.

The most significant cost element going into the overall 17.0 cent total is Intalco's cost of hot metal. Briggs testified that Intalco's "standard cost of molten metal" in the fall of 1967 was 15.2 cents (229a). This "standard" hot metal cost, as opposed to an actual cost, calculated in 1967 constitutes the principal portion of the cost number used by Amax in calculating damages over the period 1968 through 1973 (180E).

However, Briggs testified on cross-examination that Intalco's hot metal cost was not a constant but depended upon the cost of alumina to Intalco which varied over the years 1968 to 1972, the freight for transporting alumina from Australia to Washington which was much higher in 1972 than in 1968, wage rates which increased 5% or 6% a year over the period 1968 to 1972, employee benefit costs which increased during the years in question, over the 23% figure used by him, and the like (270a-275a).

No effort at all was made to prove Intalco's actual hot metal cost in May, 1968 or at any time during the period of damages. Rather Amax chose to rely solely upon the 15.2 cent "standard cost of molten metal" which Briggs orally stated was the appropriate number from Intalco's standard costing system in the fall of 1967. Not one single business record of any kind was introduced into evidence although Amax obviously has records which reflect that fundamental cost on a regular basis (498a).

The same types of rough, one-shot estimates were used for all the various cost elements which made up the projected 1.2 cent conversion cost. The labor rate and employee benefit rate for the Properzi operators was fixed at the 1968 wage rate despite subsequent increases and Briggs conceded a mathematical or typographical error as well (272a; 274a). The amount of cast house costs allocated to the Properzi was held constant over the damage period and Briggs even conceded that he had no recollection at all of how the allocation was made (276a).

Contrast these cost elements with Briggs' estimates for operating supplies (the lubricants, emulsions, spouts, fluxing rods, and other consumable items used on the Properzi); maintenance costs, and the water and gas needed in the Properzi operation. Because Intalco's only experience with the Properzi was during the period from November, 1967 until May, 1968, Amax had no alternative but to utilize Briggs' estimates based upon this limited history (233a-234a; 275a).

Amax's damage claim is the contract price specified in the Supply Contract and the Okonite Contract less Intalco's cost (hot metal cost plus conversion cost). The price under both contracts is tied directly to ingot prices published in the American Metal Market and those prices are in evidence on a monthly basis from 1966 through 1972 (265E). Amax could have matched those actual prices with the actual cost figures over the relevant period for Intalco's hot metal, which is by far the most important cost element, and for most of the elements in the conversion cost. There was no reason to rely upon speculation and forecasts for these items.

The theory behind Section 2-708(2) of the Uniform Commercial Code makes it clear that actual post-breach, costs and prices should be used in determining lost profits. Section 2-708(2) is specifically designed, as is the Code as a whole (§1-106), "to put the seller in as good a position as performance would have done" and entitles him to "the profit . . . which the seller would have made from full performance by the buyer . . . ." How can the seller be put in as good a position as if the buyer had performed if

he has no obligation to use actual post-breach costs and prices to the extent known in calculating the profits he would have made?

In adopting Amax's damage calculation *in toto*, this principle is precisely what the Court below did not apply. By estimating lost profits as of the date upon which it found Essex to have anticipatorily breached its obligations to Amax, the Court below has completely ignored these authorities which call for valuation of a promised performance as of the time when and place where performance was to be rendered. 5 *Corbin on Contracts* §1053, at 310-12 (1964); *In re New York, N.H. & Hartford R.R. Co.*, 298 F.2d 761 (2d Cir. 1962); Official Comment, U.C.C. §2-708 (McKinney 1964). In the instant case, valuation was based upon guesses made as of the date of breach.

Had Amax utilized actual cost figures for hot metal and those elements of conversion cost where actual costs were available, together with the actual selling prices fixed by the contracts, the value to Amax of the Okonite* and Supply Contracts over the five years in issue could have been calculated with tolerable certainty. By choosing to rely on estimates rather than facts in its possession, Amax failed to meet its burden of proving damages by means of the "best evidence obtainable." *Mortimer* v. *Bristol, supra,* 190 App.Div. at 462, 180 N.Y. Supp. at 62; *Esterowicz* v. *Alotun Corp., supra; Penrose* v. *Arrow Construction Co., supra.* For that reason also, Judge Motley's finding that

> "(a) The cost of producing a pound of Properzi rod at Intalco in May 1968 was 17.0 cents. . . ." (147a)

cannot be sustained.**

* In its damage calculation, Amax also assumes that it would have sold 120 million pounds of Properzi rod to Okonite during the years 1968 through 1972, and Judge Motley even went so far as to find that Amax had contracted to supply Okonite with "a minimum of 120 million pounds of Properzi rod" over that time frame (133a). In fact, the Okonite contract itself is quite clear. The contract did not obligate Okonite to purchase any tonnage from Amax, but rather covered Okonite's "requirements" for aluminum rod over the period 1968 through 1972 which were "estimated" at 120 million pounds (225E). There is no evidence in the record as to what Okonite's "requirements" were, if any, during that period.

** It is also factually inaccurate. See pp. 24-25, *infra.*

3. *Amax's Cost Projections Vary Significantly from Actual Experience on the Properzi.*

In sharp contrast with Amax's sanguine cost projections utilized in its damage calculations are the actual cost figures experienced by Amax while operating the Properzi at Intalco. The gap between the optimistic *projections* of Briggs, who freely conceded his lack of expertise on Properzi equipment,* and Amax's *actual* cost experience of producing aluminum rod on the Properzi at Intalco is so remarkably large that Amax's damage projections begin to appear wholly illusory.

James C. Dunstan, a former Essex officer with actual experience on both the Model 8 Properzi and its predecessors, and currently Associate Professor of Business Administration at the University of Virginia Graduate School of Business specializing in finance, calculated at trial the actual cost experience of producing rod at Intalco (333a-335a; 257E). Dunstan used Amax's invoices to Essex for rod produced on the Model 8 Properzi and delivered to Essex over the period December, 1967 through May, 1968 (146E-154E).

Amax's invoices to Essex, Exhibit P-103, covering the period during which the Properzi functioned at Intalco totalled $660,678.93—$454,345.73 for hot metal and $206,-333.20 for both direct and indirect conversion costs. Dividing the total cost charged by Amax to Essex by the pounds allegedly delivered ($660,678.93 divided by 2.1 million pounds), Dunstan showed that the actual cost to Essex of the rod produced at Intalco was 31.5 cents per pound. Amax's invoices to Essex also show that Amax was charging Essex 22.1 cents per pound for hot metal. By subtracting this hot metal cost from the total cost (31.5 cents minus 22.1 cents), Dunstan showed that the *actual* cost of converting the hot metal in question to rod had been 9.4 cents per pound of rod over the period that the Properzi actually operated at Intalco** (359a-363a; 257E).

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* See pp. 26-27, *infra*.

** Alternatively, the actual conversion cost can be determined from Amax's own invoices (146E-154E) by dividing the total conversion cost of $206,333.20 by the rod volume of 2,239,681 pounds specified on the invoices (as opposed to 2.1 million pounds in the blackboard calculation) which results in a conversion cost of 9.2 cents per pound.

Contrast this *actual* conversion cost in excess of 9 cents per pound with Briggs' estimated future conversion cost of 1.2 cents per pound (17.053 cents minus 15.769 cents) (180E). Contrast that *actual* cost also with Judge Motley's finding (a) that

> ". . . the cost of producing a pound of Properzi rod at Intalco in May 1968 was 17.0 cents, 15.8 cents of which was for molten metal." (147a)

That finding is based solely on Briggs' estimate of future costs, and is clearly erroneous to the extent that it purports to set forth actual costs in May 1968. Based upon Amax's own records, actual costs in May 1968 had unquestionably been no less than 25.0 cents for rod (15.769 cents for molten metal plus 9.2 cents or 9.4 cents for conversion).

Furthermore, if one compares Briggs' projected conversion cost of 1.2 cents per pound with Essex's actual cost of converting aluminum into rod via the Properzi at Boonville, Amax's damage calculation appeared even more suspect. Essex's actual cost of converting molten metal into rod by means of the Properzi, as modified by Kilburn, was slightly more than 5.0 cents per pound when operations commenced in April 1969, and averaged out approximately 4.0 cents per pound over 1969. By 1972, after two and one-half years of experience, Essex's conversion cost had been reduced to approximately 2.9 cents per pound, a figure which is in keeping with the tolling charge of 3.0 cents per pound imposed by Alcoa in 1968 for the conversion of aluminum rod on Alcoa's Model 8 Properzi (485a; 370a-371a).

True, the Properzi had been greatly modified by Kilburn by the time it was operating at Boonville, labor rates, utility costs and the like were no doubt different at Boonville from those at the giant Intalco plant, and volume affects unit costs, so that direct comparison of individual cost elements is not possible, but the above comparison does indicate that a 3.0 cents conversion cost achieved by late 1971 is, at the least, a reasonable projection of what Amax might have experienced as a conversion

cost had the dispute between the parties never materialized.*

The manifest conclusion, again, is that Amax's damage calculations, insofar as they utilize a conversion cost of 1.2 cents per pound, are inherently illusionary.

4. The Uncertainty of Amax's Damage Calculations Must Be Heavily Weighed Against It in This New Venture Context

In the present case, performance under both the Supply Contract with Essex and the Okonite Contract were contingent upon the success of a new venture—operation of the prototype Model 8 Properzi at Intalco's new plant in Washington.

The 1.2 cent conversion cost estimate and the 17.0 cent estimate for the total cost of manufacturing aluminum rod, which form the basis for Amax's damage calculation on both the Supply Contract and the Okonite Contract, were made in May, 1968 (180E). At that time, the history of design problems and equipment failures at Intalco was such that experience to date formed no basis whatsoever for a realistic estimate of future conversion costs or profits, even assuming that the equipment could ever be made to function properly (185E-191E; 68E-1[illegible]). This was the classic "new venture" situation—p[illegible]otype equipment operated by a crew of novices in the corner of a mammoth, newly-constructed aluminum reduction plant replete with problems of its own (311a; 314a-315a; 262a).

In addition, Thorley Briggs, the author of the 1.2 cent conversion cost estimate and the 17.0 cent total cost estimate, had never had any operating experience at all relating to a Properzi, and although Judge Motley at one time qualified him as an expert on the Properzi (244a-245a), thereafter he expressly disclaimed any such expertise (263a). In

* If a 3.0 cent conversion cost is substituted into Amax's damage calculation in place of Briggs' 1.2 cent estimate, the 17.0 cents cost figure becomes 18.8 cents (15.8¢ plus 3.0¢), the "lost profits" become $4,888,040 on the Supply Contract and $7,464,000 on the Okonite Contract for a total of $13,352,040, and Amax's damages which is the difference between the loss and the admitted T-ingot profit of $13,328,100 becomes $23,940.

making this 1.2 cent conversion cost estimate and the 17.0 cent total cost estimate, Briggs did not rely upon any prior experience in operating a Model 8 Properzi, nor were the estimates in any way based upon prior experience on a Model 7 or Model 6 Properzi (273a-274a). Intalco did not even consult Pechiney, one of the partners along with Amax in Intalco, nothwithstanding the fact that Pechiney had "many years" experience with Properzis (272a-273a). Briggs likewise did not consult any other Model 8 Properzi operators who had received equipment shortly after Intalco (276a).

Contrast Amax's proof with that offered by plaintiff in *For Children, Inc.* v. *Graphics Int'l, Inc., supra,* where Judge Weinfeld allowed lost profits in a new venture situation. In that case plaintiff was a middleman whose future sales price was fixed by contract, as was the case with Amax, but unlike the instant case, plaintiff's purchase price was fixed by contract with defendant who manufactured the books being sold by plaintiff. In that situation, plaintiff's lost profits were the difference between these two contract prices less additional incidental production costs incurred by plaintiff and less an appropriate allocation of plaintiff's overhead or indirect costs. All of these costs were proved to the penny and only a fair allocation of overhead had to be estimated. Judge Weinfeld found that uncertainty as to a fair allocation of overhead did not preclude the award of damages.

In the present case, however, Amax did not prove its own production costs and overhead at all so the question of fairly allocating some of these costs to the Properzi is never reached. Moreover, unlike the plaintiff in *For Children,* Amax also did not prove its purchase price from its supplier, Intalco. The guesswork offered by Amax simply does not measure up to the required standard. See *Friedman* v. *Golden Arrow Films, Inc.*, 442 F.2d 1099, 1107 (2d Cir. 1971).

D. Amax Did Not Properly Account for the Proceeds Resulting from Its Resale of the Metal as T-ingot.

Under U.C.C. §2-708(2) a seller is entitled to the profit he would have made had the buyer fully performed so that the seller will be put in as good a position as performance would have done, but in making that determination the seller is obligated to give the buyer "due credit for payments or proceeds of resale." U.C.C. §2-708(2). A seller has the same duty to mitigate damages at common law. See, *e.g.*, *Hodes* v. *Hoffman Int'l Corp.*, 280 F.Supp. 252, 257 (S.D.N.Y. 1968).

In this case, Essex's removal of the Properzi precluded Amax from selling aluminum rod either to Essex, Okonite or some third party. However, Amax's Vice President and Controller, Herbert Clough, testified that Amax was able to, and in fact did, sell the metal in question as T-ingot rather than as rod (185a). In his blackboard calculation, Clough purported to give "due credit" for this resale of the metal in the form of T-ingot, but his calculation of T-ingot profit was as distorted as was his calculation of lost profits.

Clough determined the T-ingot profit by taking Amax's purported T-ingot selling price in May 1968 of 22.1 cents per pound, and subtracting Amax's T-ingot cost at that time of 16.2 cents per pound to get a profit margin of 5.9 cents per pound. This profit margin multiplied by the volume in question, results in an offset of $13,328,100 (156E; 185a).

But Amax's T-ingot profit is a real profit which was actually made. Unlike the alleged "lost profits" attributed to the Supply Contract and the Okonite Contract which must be estimated, Amax's profit on the 225,900,000 pounds of T-ingot over the years 1968 to 1973 is an actual number which could be taken right off of Amax's accounting records for the years in question. Notwithstanding the ready availability of these figures, Amax did not prove its actual selling prices for T-ingot, it offered only limited proof of its actual cost of T-ingot, and thus made no pretense of proving its actual profits on T-ingot.

As to selling price, Amax simply relied upon Clough's testimony that Amax's selling price in May 1968 was 22.1 cents (501a). No effort was made to show actual selling prices then or in the following years. Not one single invoice was presented. Even as to the single month of May, 1968, Amax offered no business record in support of Clough's recollection.

However, aluminum T-ingot is a commodity regularly bought and sold in established commodity markets and the prevailing price is reported in official publications and journals of general circulation. Essex proved the prevailing price for T-ingot on the New York Commodities Market for each month over the period 1966 through 1972, and this proof revealed that T-ingot prices appreciated markedly during that period* (265E). See U.C.C. §2-724; C.P.L.R. 4533. These prices were the book prices quoted by the consensus of the major aluminum suppliers for 99.5 purity T-ingot delivered to the customer's location (501a).

Clough argued that these "book prices" were only the starting price in the industry from which discounting was done. For example, Amax's purported price of 22.1 cents for May 1968 was at a 2.9 cent discount from the New York Commodities Market price of 25.000 cents for that month (501a). But Clough admitted that at other times Amax sold at a substantial premium over book price because of a tight supply for aluminum (501a). Thus, in that temporary discounts or premiums would tend to offset each other, the published commodities market price is a fair average of actual selling prices.

The other half of the equation, Amax's T-ingot cost, was almost as poorly documented by Amax. Initially Amax was satisfied to rely only upon Briggs' testimony that the T-ingot cost at Intalco in May, 1968 was approximately 16.2 cents per pound (238a). However, the only documentation offered in support of that testimony was the handwritten scribble on Exhibit D-30 which is illegible al-

* One month after the alleged breach, the prevailing price increased from 25.000 cents to 26.000 cents, reached 27.000 cents during January 1969, went on to 28.000 cents by year end, and peaked at 29.000 in April 1970 where prices remained into 1972 (265E).

though it includes the word "T-ingot" and the number ".16154" (179E).

On cross examination, Briggs testified that he couldn't read the two scribbles appearing before and after "T-ingot", that he interpreted this notation to be the cost of T-ingot, but that the only basis he had for so testifying was that this number appears on this piece of paper (278a-279a). That scribble and testimony is the sole support for Judge Motley's finding (g) that

> "In May 1968, the cost of producing a pound of T-ingot at Intalco was 16.2 cents . . ." (147a)

Amax then recalled Clough to the stand to develop T-ingot costs in more detail. Reading from audited financial statements prepared by Price Waterhouse & Company for each of the years 1969 through 1972 and specifically from a column headed "Cost Per Pound Of Aluminum Sold", counsel for Amax read into the record the figures 15.8390 cents for 1969, 17.928 cents for 1970, 17.158 cents for 1971, and 17.455 cents for 1972. Clough confirmed that these reports showed the annual T-ingot cost per pound of aluminum sold (497a-498a).

If those actual T-ingot costs are matched with the actual T-ingot selling prices reflected on the New York Commodities Market, then Amax's profits on T-ingot sales are not the $13,328,100 shown on the blackboard calculation which is purportedly based upon selling prices and costs in May, 1968, but instead become $21,935,000 through 1972* which more than offsets the "lost profits" on rod sales to Essex and Okonite.

The proper "credit" is the actual profit Amax enjoyed from the actual sales of T-ingot. *Hodes* v. *Hoffman Int'l*

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* Calculated as follows:

	[Essex volume plus Okonite volume]	times	[Price minus Cost]		
1968	[15.9 plus 9]	times	[26.6 minus 16.2]	or	$ 2,440,200
1969	[18 plus 20]	times	[27.176–15.8390]	or	4,308,060
1970	[18 plus 25]	times	[28.716–17.928]	or	4,638,840
1971	[18 plus 31]	times	[29.000–17.158]	or	5,802,580
1972	[18 plus 35]	times	[26.409–17.455]	or	4,745,620
			Total		$21,935,300

Corp., supra, White Motor Corp. v. *Northland Insur. Co.*, 315 F.Supp. 689, 694 (D.S.D. 1970); see U.C.C. §2-706. Speculation or guesses as to the magnitude of that offset based upon handwritten scribbles for T-ingot cost in May 1968 and general recollection as to selling prices in May 1968 are grossly inadequate when actual costs and selling prices are readily available from the accounting records of Amax had Amax been inclined to prove them.*

Essex's proof, based upon the actual monthly sales prices for T-ingot as reflected on the New York Commodities Market and Amax's annual audited T-ingot costs, fills the void and reveals that Amax lost no profits due to Essex's alleged breach because Amax admittedly sold all the metal in question as T-ingot, prices for T-ingot increased sharply following Essex's alleged breach, Amax's cost of T-ingot was considerably more stable, and the resulting T-ingot profits more than offset the "lost profits" attributed to the Supply Contract and the Okonite Contract. Thus, Amax is entitled only to nominal damages. See 2 Anderson, *Uniform Commercial Code* §2-708:9, p. 394 (2d ed. 1971).

POINT II

Amax's breach of its maintenance obligations justified Essex's removal of the Properzi.

Pursuant to paragraph 7(d) of the Lease Agreement, Amax expressly agreed:

> "7. Amax agrees . . . to permit Essex to enter the Ferndale plant and take possession of the Properzi and remove it in the event of any breach by Amax of any of its agreements herein . . ." (160E).

Essex contends that Amax breached its maintenance obligations under the Lease Agreement, and that this breach by Amax justified Essex's removal of the Properzi.

* The only reasonable inference again is that Amax's actual profits on T-ingot more than offset the alleged "lost profits" attributed to the Supply Contract and the Okonite Contract. *Noce* v. *Kaufman, supra; West, Weir & Bartel, Inc.* v. *Mary Carter Paint Co., supra,* at p. 15.

A. Obligation for Maintenance Depends Upon Meaning of "Running In"

The obligation to provide maintenance for the Properzi was specified in paragraph 4 of the Lease Agreement:

> "4. From the completion of the installation of the Properzi, expected on or before March 31, 1967, and its running in subsequent to that date, Amax shall be responsible for the day-to-day maintenance of the Properzi, making repairs as necessary for its preservation subject to ordinary wear and tear." (159E)

Judge Motley found that Amax had refused to assume responsibility for maintenance and this finding is amply supported in the record, but she nonetheless held that this default did not constitute a breach of Amax's obligations under the Lease Agreement because she said that Amax's responsibility for maintenance did not commence until the Properzi was "operating normally" (139a).

Judge Motley's conclusion is premised upon an interpretation of the technical term "running in" in the manner urged by Amax. Amax contended that the parties envisioned three precise, consecutive, uninterrupted steps: installation of the Properzi, running in, and normal operations. Amax argued, and Judge Motley agreed, that the "running in" step was not completed until the Properzi equipment was "operating normally" (139a).

Essex agrees that those three steps were contemplated, but vigorously contests any assertion that these steps are mutually exclusive with the beginning of one following precisely upon the heels of its predecessor (136a). Quite to the contrary, the steps could and did overlap each other or have intervals between. For example, the "running in" step as to motors, furnace operation, and other specific elements commenced before the total Properzi installation was 100% complete, and was certainly concluded before the overall process was fully operable at capacity levels (443a-444a).

Regardless of the precise boundaries of each step, Essex contends that the term "running in" refers to a testing and de-bugging process designed to make sure that each phase of the Model 8 Properzi (preparation of hot metal in furnaces, casting of the hot metal on the wheel and mold, reduction of the resulting casting in the rolling mill, and coiling or collecting the rod) would operate separately and in conjunction with the other phases. "Running in" was complete at a point in time when the equipment could be made to produce rod, but before operating techniques and crew expertise had developed to the point that the equipment was "operating normally" at rates near the maximum guaranteed rate of production (443a-444a).

The parties are in agreement that the Properzi was fully installed. They are likewise in agreement that the Properzi never reached the point of "operating normally" (255a-256a). Thus, the key to whether or not Amax breached its maintenance obligations is the point in time when the maintenance obligation commenced.

Essex contends that Amax had responsibility for maintenance from the completion of installation. However, even if the Amax's maintenance responsibility did not commence until "running in" was complete, the interpretation of the Lease Agreement urged by Amax, and adopted by Judge Motley,

> "running in period would only be completed when the machine came up to normal operation and, normal operation having failed, the responsibility for maintenance remained with Essex," (139a)

is not a reasonable interpretation of what the parties surely intended in light of the facts surrounding operations, is contrary to the accepted definition of the technical term "running in", and violates the clear language of the Lease Agreement and an express agreement made by Essex and Amax in January, 1968 as to the meaning of contractual terms.

1. The Realities at Intalco Dictated That Amax Have the Burden of Maintenance

The Model 8 Properzi, although owned by Essex, was to be installed at the Intalco plant in the State of Washington. This Intalco plant, in which Amax was a 50% partner, was and is the largest aluminum reduction plant in the United States (162a; 240a; 262a). At the time the Properzi was installed, this plant was still under construction (262a). The plant represented an investment of about $200 million, the physical facilities themselves covered about 500 acres, and more than 1,000 people were employed (157a).

Intalco had crews in the cast house, where the Properzi was located, which did nothing but maintenance on a round-the-clock, rotating shift basis (317a). Intalco also had additional specialty shops outside the cast house but within the plant which could and did offer maintenance services and repairs (262a). Moreover, Intalco sent special jobs to independent service facilities beyond the plant, such as machine shops, welding shops, and the like, on a fairly regular basis as a means of supplementing its own maintenance efforts (308a).

Essex, on the other hand, had no facilities whatsoever within hundreds of miles of the Intalco plant. Essex was headquartered in Fort Wayne, Indiana, with plants located in Indiana, Kentucky, Michigan, and one in Anaheim, California (412a-415a). Although Essex had one, and sometimes two, qualified engineers on location at Intalco supervising installation, running in, and training the crew, the Intalco-Amax crew was to operate the Properzi (337a-338a).

The Properzi being installed and operated in Intalco was prototype equipment—the first of its kind (18a). Although there had been earlier model Properzis (Model 5, Model 6, Model 7), many new components were included in the Model 8 Properzi, the emulsion and lubrication systems were different, the casting wheel itself was different, the rolling mill had been redesigned, and the cooling system was different (529a-530a; 568a-569a). Thus, maintenance and repair problems were inevitable.

The crew operating this equipment was totally green—except for a few hours of "training" at a Nichols plant on a Model 7 Properzi. Not one single operating person had any experience whatsoever on Properzi casting equipment, although Amax's executives had recommended that a search be made for such people. Mistakes resulting in breakage of parts and downtime were inescapable and in fact occurred (311a-314a; 218E).

In that factual context, what reason would there be for Essex to undertake to provide maintenance services once the equipment was installed, de-bugged and capable of operating? Essex had no plant nearby, it had no maintenance staff available, had no authority over the Intalco personnel, and it had no right to bring maintenance personnel from outside independent contractors into Intalco's plant. Once the equipment was installed and operable, Essex was simply to provide training for the crew and the technical assistance needed to run the Properzi hundreds of miles from its own facilities.

Amax, on the other hand, through Intalco, had direct access to the equipment at all times, had authority over the operating crew, and had qualified maintenance people readily available both in the plant and from outside subcontractors. Clearly, the practicalities were such that the burden for maintenance logically should fall upon Amax once the equipment was installed and would function.

2. *The Technical Meaning of "Running In" Supports Essex's Interpretation*

James Dunstan, a graduate engineer with over 20 years experience at Essex and elsewhere as a production foreman, plant manager, and manufacturing operations manager (333a-335a) testified that the term "running in" has a technical meaning:

> "Q. What was your understanding at that time of the meaning of running in?
>
> A. I think running in, in an engineer's idea, means pushing the buttons and making sure the equip-

ment is all aligned. You run in bearings, you run in motors to make sure the equipment is all aligned and sometimes you run it in without even putting a load on it. So running in just means pushing the button, make sure all the equipment is aligned, and that everything works properly.

Q. Is equipment, in your experience, Mr. Dunstan, always run in after it's been installed at the location where it is to operate?

A. No, most times, when we bought equipment, we would force the factory to run in the equipment so that when we got it there, we could push the button and we were assured there was no problem." (339a).

Charles Kilburn, another graduate engineer with over 25 years experience at Essex and elsewhere installing, starting-up, and operating complicated manufacturing equipment, including a Model 5 Properzi (412a-416a), testified in the same manner:

"Q. What does running in mean to you, Mr. Kilburn?

A. Running in to me is the initial start-up.

Q. When does it end?

A. Well, as soon as each of the components would function mechanically or electrically as an independent . . . [interruption by the Court and Counsel]

A. [continuing] For instance, we always use the term "start-up," which means, if you have a motor, you want to make sure that it responds to the electrical controls that start it, that you adjust it to the right speeds, that the mill turns over mechanically without any interference, that the wheel would operate mechanically, that all these things would be ready to receive the process. To me this is start-up.

Q. Well, at what point in time, Mr. Kilburn, had you completed this process, if ever?

A. Well, I felt that after we had made a casting and put it through the mill and actually made some rod, that certainly the start-up period was considered complete." (443a-444a).

Amax, although disagreeing with Essex's definition offered no expert testimony to the contrary, and the technical definition offered by Amax (332a-333a; 443a) support Essex's interpretation:

> "*Running In.* The operation of new or repaired machinery or equipment for the detection of faults and to insure smooth, free operation of parts before delivery to the purchaser or user." Krispen, *Dictionary of Technical Terms*, p. 352 (11th ed. rev. 1970)
>
> "*Running In.* Running a new engine or machine under light load for some time to allow proper clearance to become established and friction-surfaces to be polished." *Chamber's Technical Dictionary*, p. 736 (3d ed. rev. 1958)
>
> "*Running In An Engine*—Running an engine slowly (and gradually faster) for some time so that its parts may wear to a perfect fit." *Dictionary of Scientific and Technical Words* (1952)

In short, "running-in" to engineers and professional people is intended to refer to an initial, start-up procedure used on new machinery "for the detection of faults", "under light loads for some time to allow proper clearance to become established", and for testing by the manufacturer "before delivery." Such technical meaning of words of art should be applied unless context or special usage clearly indicates a different meaning. See *Nau* v. *Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 198, 36 N.E. 2d 106, 111 (1941); *Restatement of Contracts* (Tentative Drafts 1-7) §228 (1973).*

* The history of negotiations between Essex and Amax which resulted in the Lease Agreement also supports this technical definition. The initial draft agreement prepared by Amax following the original negotiating session on August 5, 1966 provides that Essex was responsible for installation, training of personnel and "de-bugging of the facility" (205E-206E; 209E). In the final version, of course, the words "running in" were substituted for "de-bugging" (159E). The word "de-bugging" supports Essex's interpretation that an initial testing and checking process was being referred to.

3. The Parties Expressly Agreed Upon Essex's Definition

The Lease Agreement uses both the term "running in" and the term "operating normally." The exact meaning of the term "operating normally" was of real importance to Essex because Amax had no obligation under the Supply Contract to ship rod to Essex until the Properzi equipment was "operating normally" (165E), and rod plus royalties were the only benefits Essex was to receive from the whole arrangement (339a).

Thus, in January, 1968, Amax and Essex had a meeting to discuss the multitude of operating problems being experienced at Intalco and to formulate a specific definition of "operating normally." At that time, Essex proposed:

> "The Properzi will be considered operating normal *beyond* the original run in period and become the operating responsibility of Amax when . . ."

specified operating results had been achieved (13E). Amax concurred with this definition (17E).

Thus, it is clear that both parties expressly agreed that "running in" was intended to mean an operational status which was completed at some point in time *before* the Properzi was "operating normally."

4. Completion of "Running In"

Installation of the Properzi was completed during October, 1967 and Amax concedes that the equipment was fully installed within the meaning of the Lease Agreement (255a-256a).

The first casting was made on the Properzi at Intalco on November 3, 1967. Aluminum rod was first produced on November 14, 1967. By December 11, 1967, over 70,000 pounds of finished rod had actually been shipped to Essex (442a-443a; 57E; 69E). By this point in time, then, each phase of the process would function separately and in conjunction with the other phases, and the Model 8 Properzi could and did actually produce rod. Thus, the equipment had been phased in, de-bugged, tested and the "running in" by Essex had been completed even though crew expertise

and operational adjustments and techniques had to be perfected before normal operations at high production rates could be maintained.

In any event, by May 17, 1968, when operations shut down and Essex terminated the two contracts, shipments of finished rod to Essex had totalled approximately 2,100,000 pounds, and the equipment had been operated over one shift in April at 11,000 pounds per hour (146E-154E; 156E; 38E). Therefore, at some point during this December-May time-frame, the "running in" of the Properzi by Essex had certainly been completed.

B. Amax Refused at All Times to Assume Responsibility for Maintenance

Judge Motley found that Amax refused to assume the responsibility for maintenance, but concluded that this did not breach Amax's obligations under the Lease Agreement because she adopted Amax's definition of "running in." If, on the other hand, Essex's definition of "running in" is correct, then Amax's refusal to assume responsibilty for maintenance is a breach of the Lease Agreement. Judge Motley's finding that Amax did in fact refuse to assume the responsibilty for maintenance is well supported by the record.

In late December, 1967, Kilburn complained bitterly to Amax and Intalco that his efforts to get the Properzi "operating normally" so that Amax would have an obligation to provide Essex with rod under the Supply Contract were being hampered by inadequate maintenance (445a). An Intalco report (231E-234E), prepared in response to these complaints by Kilburn (249a), reflected the following performance by the maintenance personnel after eliminating weekends and holidays: on eight "emergency" requests for maintenance, the time spent averaged 4.9 hours, but it was 2.50 days on the average before the work was done; on some 16 "immediate" requests, the average time spent was 4.93 hours but it was 2.56 days on the average before the work was done; on six "normal" requests, the average time spent was 2.38 hours but it was 3.83 days on the average before the work was done (259a-262a).

At a meeting at Intalco on January 9, 1968, both Kilburn and Dunstan complained to the Amax and Intalco representatives that maintenance was inadequate (445a; 341a). Thereafter, representatives of Nichols, American agent for the Italian manufacturer, came to the same conclusion. Paul Raiford, a Nichols engineer, visited the Intalco operation because he felt that the equipment itself could be operated successfully and he concluded that the equipment "wasn't getting the priorities that were required in the way of metallurgical support, technical, maintenance, engineering, and so forth . . ." (557a-558a). In March, 1968, when another Nichols technician complained that "no one paid any attention to detail" and "they let little things go and nobody gives a damn," Raiford testified that although this was more explicitly worded than he would have stated it, he nonetheless agreed that there was a lack of concern for detail and general inattentiveness at Intalco (561a-562a).

On March 8, 1968, Kilburn once again complained at a meeting with Intalco representatives about the "sluggish maintenance pace" (223E). Notwithstanding this situation, it was not until early May, 1968, following another meeting between Intalco and representatives of Nichols, that Intalco finally assigned a mechanical maintenance man to the Properzi (309a; 315a-317a).

Meanwhile, Amax was insisting that Essex pay for all maintenance services even though maintenance was the responsibility of Amax once the equipment had been run in. Following the meeting at Intalco on January 9, 1968, Essex protested Amax's bills for maintenance costs (14E). Rather than reach an accommodation and get on with production as urged by Essex, Amax consulted with lawyers:

> "On the question of contract language, our lawyer who wrote the contract feels there is no doubt that the responsibility for the maintenance costs is Essex'." (254E).

As a result, Amax continued to dun Essex for maintenance expenses (146E-154E).

Essex then sent its Corporate Director of Costs to Intalco to review the overall financial situation, and his report dated April 29, 1968 concluded that "Essex is not liable for the general maintenance overhead," that as to the fixed cost allocation "we do not feel these should be billed or paid" by Essex and that "the same principles apply" to maintenance charges (171E-172E). As late as June 25, 1968, Amax was still billing Essex for maintenance charges (174E), and in July Essex was still responding that the controversy over maintenance and other aspects of the fixed charges had "never been resolved to our satisfaction" (178E).

Under the circumstances, Judge Motley's finding that Amax refused to assume responsibility for maintenance is compelled by the record.

C. Amax's Breach Justified Essex's Removal of the Properzi

The failure of Amax to assume responsibility for maintenance and repairs constituted a breach of Amax's responsibilities under the Lease Agreement. Consequently, Essex had the right to remove the Properzi.

A material failure to give performance by one party to a contract deprives that party of the right to enforce performance by the other. See 6 *Williston on Contracts* §813 (3d ed. 1962); 6 *Corbin on Contracts* §1253 (1962). The case law in New York confirms that the non-performance by one party operates to discharge the other from further performance. See *Bookstaver* v. *Jayne*, 60 N.Y. 146 (1875); *Melodies, Inc.* v. *Mirabile*, 7 A.D.2d 783, 179 N.Y.S.2d 991 (3d Dept. 1958).

Of course, a trivial and innocent breach of a contractual obligation will not normally excuse the other party from rendering performance under the contract. See *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 241-42, 129 N.E. 889, 890 (1921); *New York Tel. Co.* v. *Jamestown Tel. Corp.*, 282 N.Y. 365, 26 N.E.2d 295 (1940); *Rosenthal Paper Co.* v. *National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766 (1919); 6 *Williston on Contracts* §829 (3d ed. 1962).

In the instant case, it is clear that Amax's breach of its maintenance responsibilities is material. As a matter of fact, this breach went to the heart of the matter. Essex had responsibility to make prototype equipment operate normally, as defined by the parties, in a plant operated and controlled by its adversary. Installation had been completed, the equipment had been adjusted and run in, and a green crew was endeavoring to produce rod under Essex's supervision. The equipment was not to become the operating responsibility of Amax, and Amax had no obligation to supply Essex with rod, until the Properzi had operated at an average production rate of 90% of the 14,000 lb./hr. guaranteed performance over a two-week period, had produced substantial rod during that time, and the production crew had stabilized (13E, 17E). There was no way that Essex could achieve that result unless Amax provided and paid for maintenance, promptly and effectively. In short, Amax's breach precluded any hope that Essex could make the Properzi "operate normally". See *Wright* v. *Douglas Furniture Corp.*, 98 Ill. App. 2d 137, 240 N.E.2d 259 (App. Ct. 1968).

Moreover, the Court need consider whether one party's breach was sufficiently important and material to discharge performance by the second party *only if* the contract is silent on that subject. Thus, in *Jacob & Youngs* v. *Kent*, Judge Cardozo emphasized:

> "Where the line is to be drawn between the important and the trivial cannot be settled by a formula . . . . We must weigh the purpose to be served, the desire to be qualified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. *This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose in the silence of the parties, where the signifi-*

cance of the default is grievously out of proportion to the oppression of the forfeiture." 230 N.Y. at 243-44, 129 N.E. at 891. (Emphasis added.)

Similarly, in the *Rosenthal Paper Co.* case, *supra*, the Court of Appeals emphasized:

> "Parties have the right to contract as they will for any lawful purpose, and the problem for the courts is to ascertain, in accordance with established rules of interpretation, the real contract of agreement. If they make their promises dependent or independent throughout, or dependent in part and independent in part, it is not for the courts to thwart them." 226 N.Y. at 320, 123 N.E. at 768.

See also *6 Corbin on Contracts* §1266 (1962).

In this case, Essex recognized that it would be helpless hundreds of miles from its own facilities if Amax did not perform as it had agreed to do: supply a crew, operate the Properzi, and provide day-to-day maintenance and repairs. Essex made sure that it had the express right under the Lease Agreement to remove the equipment if Amax breached:

> "7. Amax agrees . . . (d) to permit Essex to enter the Ferndale plant and take possession of the Properzi and remove it in the event of *any* breach by Amax of *any* of its agreements herein . . . ." (Emphasis added.) (160E)

Thus, even though Amax's breach was material, that issue need not be reached. To say that only a material breach would justify termination and thereby disregard the fact that the word "any" was carefully inserted into this provision to modify "breach" as well as "agreements" would belie contract law. It is well settled that unequivocal language in a contract must be given full effect when it clearly expresses intention. *See, e.g., Ivor B. Clark, Inc.* v. *Boston Road Shopping Center, Inc.*, 24 M.2d 84, 207 N.Y.S.2d 582 (Sup. Ct. N.Y. Co. 1960). The objective to

be obtained in interpreting a written contract is to determine "what is the intention of the parties as derived from the language employed". 4 *Williston on Contracts* §600, at p. 280 (3d ed. 1961); *Hartford Accident & Indemnity Co.* v. *Wesolowski*, 33 N.Y.2d 169, 305 N.E.2d 907, 350 N.Y.S.2d 895 (1973). Where a word of general and common meaning has been used in an instrument properly executed, such word cannot be limited in scope by a court in the absence of a showing of mutual mistake or fraud. See, *e.g.*, *C. L. Holding Corp.* v. *Schutt Court Homes, Inc.*, 280 App. Div. 341, 113 N.Y.S.2d 610 (1st Dept. 1952), *aff'd*, 307 N.Y. 648, 120 N.E.2d 837 (1954).

In construing a written contract, a court must place itself in the situation of the parties at the time the contract was made. See, *e.g.*, *Rottkamp* v. *Eger*, 74 M.2d 858, 346 N.Y.S.2d 120 (Sup. Ct. Suffolk Co. 1973); *Easton* v. *Universal Pictures Co., Inc.*, 56 M.2d 406, 288 N.Y.S.2d 776 (Sup. Ct. N.Y. Co. 1968). When Essex entered into its agreement with Amax, it was imperative that Amax carry out all the obligations to which it had agreed—supplying a crew, operating the Properzi and providing day-to-day maintenance and repairs. Otherwise, Essex would be helpless miles from home, and the entire arrangement would fail. Thus, the word "any" was inserted twice into paragraph 7(d) of the Lease Agreement to mean precisely *any* breach of *any* of Amax's agreements.

Moreover, if "any" was not inserted to mean "any", there would have been no reason to include it. Lawyers prepared this contract, and thus the authors were well aware that in the usual contract situation only material nonperformance will justify termination unless otherwise agreed to. The word "any" was inserted twice in order to make it clear that, whether or not material, any nonperformance of Amax's obligations would entitle Essex to remove its machine.

The New York courts have repeatedly held that where power is reserved to one party to terminate the contract if the other fails to perform as specified, and that in fact occurs, the termination clause will be enforced as written.

In *A. S. Rampell, Inc.* v. *Hyster Co.*, 3 N.Y.2d 369, 382, 144 N.E.2d 371, 379, 165 N.Y.S.2d 475, 486 (1957), the Court of Appeals refused to read "reasonable notice" into a contract which expressly provided that it could be terminated at will:

> "But where, as here, the parties have agreed to a termination clause, the clause has been enforced as written . . . The parties assented to the terms of the contract when they entered into it, and no reason is now presented which justifies altering the clear provisions of the agreement."

Similarly, in *Cycleway, Inc.* v. *Kawasaki Motors Corp.*, 77 M.2d 829, 354 N.Y.S.2d 812 (Sup. Ct. Oneida Co. 1974), plaintiff sought to enjoin defendant from terminating a distributorship agreement pursuant to a particular provision, but the court denied such relief because of an express termination clause:

> "While it is the law of this state that a breach of contract must be material to give cause for rescission, . . . it is also the law of this state where the parties have agreed to a termination clause, it must be enforced as written. . . ." 77 M.2d at 832, 354 N.Y.S.2d at 816. (Citations omitted.)

See also *Missir* v. *American Oriental Ice Mfg. Co.*, 201 App. Div. 756, 195 N.Y.S.2d 191 (2d Dept. 1922); *Hal Roach Studios* v. *Film Classics, Inc.*, 68 F. Supp. 563 (S.D.N.Y.), *aff'd*, 156 F.2d 596 (2d Cir. 1946); *Noah* v. *L. Daitch & Co., Inc.*, 22 M.2d 649, 652, 192 N.Y.S.2d 380, 385 (Sup. Ct. N.Y. Co. 1959); *Division of Triple T Service, Inc.* v. *Mobil Oil Corp.*, 60 M.2d 720, 304 N.Y.S.2d 191 (Sup. Ct. West. Co. 1969), *aff'd*, 34 A.D.2d 618, 311 N.Y.S.2d 961 (2d Dept. 1970); *McGuire* v. *Rudy's Rail*, 73 N.Y.S.2d 72 (Sup. Ct. Rich Co. 1947).

Other jurisdictions follow the same rule as New York. In *R. H. White Co.* v. *Jerome H. Remick & Co.*, 198 Mass. 41, 84 N.E. 113 (1908), the contract in question provided:

> "Fourteenth. It is further agreed that in case of the violation by party of the second part or any of its

> agents or employees, of any of its agreements in this contract contained, party of the first part shall have the right forthwith to declare this contract null and void, and to re-enter the premises above described and remove party of the second party and its property therefrom." 84 N.E. at 115.

Defendant violated a contract provision, and plaintiff terminated the contract and sued for damages. The Supreme Judicial Court of Massachusetts held:

> "The purpose of the insertion of the fourteenth clause was doubtless to avoid any question as to whether the breach (if any should occur) was of such gravity, or bore such a relation to the essence of the contract as to justify a rescission of it by the party of the first part, and also to authorize it even upon the slightest deviation from the contract to eject at once the party of the second part. That at any rate was the legal effect of the clause." 84 N.E. at 117.

Thus, the court upheld the enforceability of that clause in the contract and in addition allowed plaintiff to recover full damages for defendant's breach. See also *Ritter* v. *Perma-Stone Company*, 325 P.2d 442 (Okla. 1958).

In summary, Amax has breached its maintenance obligations under the Lease Agreement, and the Lease Agreement expressly provided that under such circumstances Essex was entitled to enter the plant and remove the Properzi. The clause should be enforced as it was written and agreed to by both parties.

D. Essex Is Entitled to Recover the Damages Sustained by It as a Result of Amax's Breach

The construction costs incurred by Essex in installing the Properzi at Intalco totalled $145,247.66. Upon removal, parts of the holding furnaces whose total cost was $154,000 could be salvaged but the refractory linings, having a value of $84,700, could not. Essex had to transport the dismantled equipment to its own facilities at a cost of $17,522.63, and

then store it in a warehouse pending completion of the Boonville plant at a cost of $1,072.75. These disbursements, together with miscellaneous travel expenses, totalled $255,896.96* (261E). In addition to these disbursements Essex spent $87,763 and incurred the loss of over 1,000 man hours in making changes to the casting wheel, spouts and other equipment in an attempt to get the Properzi to operate at full capacity (38E).

Because Amax breached its maintenance obligations and Essex thereafter exercised its contractual right to remove the Properzi, Essex's efforts at Intalco were frustrated and Essex's investment there was totally wasted. Thus, Essex is entitled to recover all of these damages, totalling $343,659.96. Such a recovery does not compensate Essex for the loss of executives' time, nor does it take into account the royalties Essex would have received from Amax for sale of rod by Amax to third parties.

Essex is entitled to recover these damages notwithstanding Judge Motley's conclusion that Essex failed to make a good faith effort to bring the Properzi up to specifications (139a). In fact, it is clear that Essex made a sustained effort to get the Model 8 Properzi installed, run in, and operating normally (84a-86a).

In *Friedman* v. *Golden Arrow Films, Inc.*, 442 F.2d 1099 (2d Cir. 1971), this Court considered a similar situation under New York law where both parties to a contract purportedly breached their obligations. In that case, the Court remanded the case for the purpose of allowing further findings and evidence on the issue of whether the party seeking damages "performed each and every obligation required of them to be performed". 442 F.2d at 1106.

In the instant case, however, Amax's breach of its obligations to assume responsibility for maintenance occurred at a very early stage—well before there was any evidence at all that Essex failed to make a good faith effort. Thus, Essex is entitled to damages on the present record. At the most, the case should be remanded to Judge Motley in

* Contrast Essex's proof of damages and the detailed back-up for each element (tabulated on Ex. D-730 (261E)) with Amax's blackboard calculation (156E) and purported "back-up" (179E).

order to ascertain whether Essex had substantially performed its duties prior to Amax's breach, and therefore could not only remove the Properzi but also recover damages.

Conclusion

Because of Amax's failure of proof in this new venture situation, it cannot recover lost profits. In any event, Amax's actual profits on T-ingot sales exceeded the "lost profits" alleged. Amax has neither claimed nor proven any incidental damages under U.C.C. §2-710 or otherwise. Thus, Amax can only recover nominal damages. Assuming a breach by Essex, which is disputed in Point II, Amax is only entitled to judgment for $424,898.95 based upon the settlement agreement of July 25, 1968, which encompassed the cost of metal used at Intalco plus disputed maintenance and fixed cost charges.

Because Amax breached its maintenance obligations, Essex exercised its contractual right to remove the Properzi, and is entitled to judgment for $343,659.96 plus interest.

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Respectfully submitted,

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